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NO. 90-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THOMAS H. HAJECATE AND
DOROTHY A. HAJECATE,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Fifth Circuit erred in permitting new disclosures of grand jury materials in a civil tax case pursuant to Federal Rules of Criminal Procedure Rule 6(e) orders entered prior to this Court's decision in *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983), without a showing of "particularized need" for such new disclosures?

PARTIES TO THE PROCEEDINGS

1. Thomas H. Hajecate and Dorothy A. Hajecate — Petitioners
2. United States of America — Respondent

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	I
PARTIES TO THE PROCEEDING	II
TABLE OF CONTENTS	III
TABLE OF AUTHORITIES	IV
REFERENCE TO OPINION BELOW	1
GROUNDS FOR JURISDICTION	2
RULE INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	9
I. New disclosures of grand jury materials obtained by the IRS pursuant to Rule 6(e) orders entered prior to this Court's decisions in *Baggot* and *Sells Engineering* cannot be permitted without a showing of particularized need.	9
II. Res Judicata is not a proper basis for failing to apply the requirements of *Sells Engineering* to preexisting Rule 6(e) orders.	12
III. The propriety of prospective disclosures of grand jury materials under pre-*Sells Engineering* Rule 6(e) orders is now the subject of conflicting decisions of seven Courts of Appeals.	16
CONCLUSION	17
APPENDIX A—Opinion of the Fifth Circuit Court of Appeals dated December 14, 1989	1a
APPENDIX B—Order of Fifth Circuit Court of Appeals Denying Motion for Rehearing dated January 8, 1990	7a
APPENDIX C—Order of District Court for the Southern District of Texas, dated May 25, 1988	8a
APPENDIX D—Excerpts from Transcript of District Court Hearing on September 2, 1988	10a
APPENDIX E—Order of District Court for the Southern District of Texas, dated September 14, 1988	12a

TABLE OF AUTHORITIES

CASES	Page
Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974)	14, 15
Commissioner v. Sunnen, 333 U.S. 591 (1948)	13
Douglas Oil v. Petrol Stops Northwest, 441 U.S. 211 (1979)	10
Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 559 (1984)	15
Graham v. Commissioner, 770 F.2d 381 (3d Cir. 1985)	17
Hajecate v. Commissioner, 90 T.C. 280 (1988)	5, 8
In re Disclosure of Grand Jury Proceedings (Basic Earth Science Systems, Inc.), 821 F.2d 1290 (7th Cir. 1987)	12
In re Grand Jury Proceedings (Henry Kluger, Deceased), 827 F.2d 868 (2d Cir. 1987)	12, 16
In re Grand Jury Proceedings "Operation Gateway," Appeal of James Charles Dugan (Dugan I), 839 F.2d 390 (7th Cir. 1988)	12
In re Grand Jury Proceedings "Operation Gateway" (Dugan II), 877 F.2d 632 (7th Cir. 1989), *cert. denied*, _____ U.S._____, 110 S. Ct. 839 (1990)	13
In re Sells, 719 F.2d 895 (9th Cir. 1983)	11, 15, 16
In the Matter of the December 3, 1979, Houston Division Federal Grand Jury, 889 F.2d 1466 (5th Cir. 1989)	1, 9, 12
James v. Beaufort County Board of Education, 465 F.2d 477 (4th Cir. 1972)	13
Linbach v. Hooven & Allison Co., 466 U.S. 353 (1984)	15
State Farm Mutual Automobile Ins. Co. v. Duel, 324 U.S. 154 (1945), *reh. denied*, 324 U.S. 887 (1945)	15
System Federation No. 91 v. Wright, 364 U.S. 642 (1961)	15
Thorpe v. Housing Authority, 393 U.S. 268 (1969)	15
United States v. Baggot, 463 U.S. 476 (1983)	5, 6, 9, 12
United States v. John Doe, Inc. I, 481 U.S. 102 (1988)	9, 11, 16
United States v. Sells Engineering, Inc., 463 U.S. 418 (1983)	*passim*
United States v. Sutton, 795 F.2d 1040 (Temp. Emer. Ct. App. 1986)	12, 16
United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801)	15
United States v. (Under Seal), 783 F.2d 450 (4th Cir. 1986), *cert. denied sub nom., Ravens Hollow Ltd. v. United States*, 481 U.S. 1032 (1987)	16
United States v. Wallace & Tiernan Co., 336 U.S. 793 (1949)	14

Page

UNITED STATES STATUTES

18 U.S.C. Section 1001 ..... 3, 4
18 U.S.C. Section 1341 3
18 U.S.C. Section 1343 3
18 U.S.C. Section 1962(c) and (d) 3
26 U.S.C. Section 7201 4
26 U.S.C. Section 7206(1) 4
26 U.S.C. Section 7482(a) 6
28 U.S.C. Section 1254(1) 2
31 U.S.C. Section 1058 3
31 U.S.C. Section 1059 3
31 U.S.C. Section 1101 3
31 U.S.C. Section 1121 3
Fed. R. Crim. Proc. 6(e) ..... *passim*

OTHER AUTHORITIES

46 Am. Jur. 2d *Judgments* (1969)
§ 457 13
§ 477 13
§ 478 13
§ 518 13
10 C.F.R. §§ 212.1 through 212.188 (1980) 3

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REFERENCE TO OPINION BELOW

The opinion of the court of appeals is reported as *In the Matter of the December 3, 1979, Houston Division Federal Grand Jury*, 889 F.2d 1466 (5th Cir. 1989), and is reproduced in Appendix A to this Petition.

There was no formal opinion of the district court. The pertinent disclosure orders issued by the district court are reproduced in Appendices C and E to this Petition.

GROUNDS FOR JURISDICTION

The judgment appealed from was rendered by the Fifth Circuit on December 14, 1989. A Petition for Rehearing was filed December 28, 1989, and was denied by order dated January 8, 1990, which is reproduced in Appendix B to this Petition. The jurisdiction for this Court to review the judgment by Writ of Certiorari is contained in 28 U.S.C. Section 1254(1).

RULE INVOLVED

This case involves Rule 6(e) of the Federal Rules of Criminal Procedure, which provides in pertinent part as follows:

> (e) Recording and Disclosure of Proceedings.
>
> * * *
>
> (2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the Government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. Any knowing violation of Rule 6 may be punished as a contempt of court.
>
> (3) Exceptions.
>
> * * *

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; * * *

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

STATEMENT OF THE CASE

A series of grand juries in the United States District Court for the Southern District of Texas dated April 17, 1978, April 30, 1979, and December 3, 1979, conducted an investigation of practices in the domestic petroleum industry that included certain activities of Petitioner Thomas H. Hajecate, his son Thomas M. Hajecate, their businesses, and various foreign and domestic individuals and companies. The investigation related to possible charges premised upon the miscertification of "old" oil as "new" oil under regulations adopted by the Department of Energy, 10 C.F.R. §§ 212.1-212.188 (1980), including charges under the Racketeer Influenced and Corrupt Organizations Statute, 18 U.S.C. § 1962(c) and (d), for mail and wire fraud, 18 U.S.C. §§ 1341 and 1343, and for willful false or fraudulent statements, 18 U.S.C. § 1001, for prohibited transactions with foreign financial institutions and currency transported into the United States, 31 U.S.C. §§ 1058, 1059, 1101 and 1121, and for the filing of false or fraudulent income tax returns

under 26 U.S.C. (Internal Revenue Code) §§ 7201 and 7206(1).

In 1979 and 1981, the United States District Court for the Southern District of Texas, Houston Division, entered *ex parte* Rule 6(e) orders granting access and disclosure to the Internal Revenue Service ("IRS") of all subpoenaed books, records and testimony that had been presented to those grand juries, to assist the IRS in auditing the income tax returns of the persons being investigated by the Grand Jury. The Rule 6(e) orders were entered without notice or opportunity for Petitioners or any other affected parties to object to them or to participate in the proceedings. There was no showing of "particularized need" made by the government. Petitioners did not learn about the issuance of those orders until the time for appeal had expired.

Mr. Hajecate and others were indicted on various charges; all of the charges against Petitioner were dismissed by motion of the government when he pled guilty to a two-count superseding information charging violations under 18 U.S.C. § 1001. After the criminal case was disposed of, no further or related proceedings involving either Petitioner were pending in the United States District Court for the Southern District of Texas.

Pursuant to the 1979 and 1981 *ex parte* Rule 6(e) orders, civil IRS agents audited all documents produced to the grand juries and all grand jury testimony to permit the IRS to make a claim against Petitioners for additional income taxes and penalties for the tax years 1976 through 1978. Between 1981 and October 1982, as a result of the IRS audit of the grand jury materials, it issued Notices of Deficiency asserting civil tax deficiencies and

penalties against Petitioners for the tax years 1976 through 1978, based upon Petitioners' alleged omission of items of income and the disallowance of various expenses. Petitioners instituted cases before the United States Tax Court to challenge the claims for additional taxes and penalties, and their cases are presently awaiting trial.

On June 30, 1983, while the Tax Court cases were pending, this Court issued its opinions in *United States v. Baggot,* 463 U.S. 476 (1983), and *United States v. Sells Engineering, Inc.,* 463 U.S. 418 (1983), which announced new standards under Rule 6(e) for disclosure of grand jury materials to the IRS for civil tax audit purposes. Thenceforth, when the government sought disclosure of grand jury materials for civil tax purposes, it would be required to make a strong showing of "particularized need" for those materials and to show that their anticipated use is "preliminar[y] to or in connection with a judicial proceeding." This Court's opinions in those cases did not address the effect of those decisions upon outstanding Rule 6(e) orders, such as the orders at issue here.

Since the IRS possessed the grand jury materials in this case for eight years and intended to use them in the pending Tax Court cases, Petitioners in September 1987 filed a motion to determine the IRS' right to use the grand jury materials, and to prohibit the IRS from further use or disclosure of the grand jury materials absent a proper Rule 6(e) order. In *Hajecate v. Commissioner,* 90 T.C. 280 (1988), the Tax Court held that the grand jury materials could not be used or disclosed by the IRS absent a new Rule 6(e) order—one that was obtained under the standards of *Sells Engineering.*

Under 26 U.S.C. (I.R.C.) Section 7482(a), the IRS could have, but did not, seek an interlocutory appeal of that Tax Court order to the Fifth Circuit Court of Appeals. Instead, on May 25, 1988, the IRS filed a new *ex parte* motion for a Rule 6(e) order in the District Court for the Southern District of Texas, premised upon what it alleged to be a sufficient showing of "particularized need." In this proceeding, the IRS did not ask the district court to clarify its preexisting orders or determine their status in light of this Court's opinions in *Baggot* and *Sells Engineering,* but instead abandoned the previous orders. The district court, acting *ex parte,* granted a new order permitting disclosure on that same date (Appendix C). Petitioners subsequently learned of the new order and on June 21, 1988, filed a motion in that district court to review and vacate the order, on the ground that, as a matter of law, the IRS had failed to present sufficient facts to support the requested dislosures under Rule 6(e) as required by *Sells Engineering.*

The district court held a hearing on the Petitioners' motion on September 2, 1988. At the hearing, government counsel stated that the IRS sought only the records of Uni Oil Company, a business entity involving Petitioner Mr. Hajecate. Government counsel stated that no other grand jury records and no transcripts of testimony were needed. On that basis, the district court stated that the government had shown a "particularized need" for the records of Uni Oil Company, and directed the government to prepare an order that would limit the future disclosures of grand jury materials to the records of Uni Oil (Appendix D).

Immediately thereafter, government counsel prepared a written order that authorized the disclosure of virtually

all of the grand jury materials in the IRS's possession. The new order granted access to "subpoenaed books and records, or copies thereof," without limitation to their source, together with all the "books, records, information and materials" brought before the three grand juries in question. This order was entered by the district court *ex parte* on September 14, 1988 (Appendix E). Upon receiving that order, Petitioners filed a motion to review and amend that order on September 26, 1988, so as to limit disclosure to Uni Oil records that were the subject of representations made by government counsel, the extent of its showing of "particularized need," as well as the district court's comments on the record on September 2, 1988. On December 27, 1988, the district court denied that motion without a hearing and without any explanation.

On February 24, 1989, Petitioners filed a timely Notice of Appeal of the district court's order to the United States Court of Appeals for the Fifth Circuit (Docket No. 89-2915). The issue presented by that appeal was whether the IRS had made a sufficient showing of "particularized need" for disclosure of any grand jury materials beyond the books and records of Uni Oil Company. Petitioners argued that the district court erred in granting the expansive disclosure because the IRS had failed to satisfy the standards set forth by this Court in *Sells Engineering,* in that the government had failed to demonstrate: (1) that the release of the subject materials was necessary to avoid an injustice in another judicial proceeding; (2) that a need for disclosure existed which outweighed the need for continuing secrecy; and (3) that its request was structured to cover only the materials needed in the pending litigation.

The government offered three responses to Petitioners' appeal. First, ignoring the fact that the government had forfeited its right to appeal the Tax Court's order on an interlocutory basis, it criticized the Tax Court's opinion in *Hajecate v. Commissioner, supra,* without regard for that Court's inherent power to regulate the evidence to be admitted in its own proceedings. Second, ignoring the fact that the IRS had abandoned the pre-*Sells Engineering* orders during the district court proceeding, it argued that the 1979 and 1981 Rule 6(e) orders were "valid, final orders" that should have been sufficient to permit the IRS to use the grand jury materials without having to obtain a new Rule 6(e) order, and without regard to the standards for disclosure that had been promulgated by this Court in 1983. Third and last, the government contended that the moving papers, testimony, and representations of counsel presented to the district court satisfied the "particularized need" standard with respect to all of the matters covered by the district court's order.

The Court of Appeals sidestepped the controversy presented by the parties relative to the proper application of the "particularized need" standard of *Sells Engineering.* Its opinion concluded that "(t)he district court did not purport to base its new production order on a standard of 'particularized need.' " At the same time, it specifically construed the district court's order of September 2, 1988, as if the "District Court had simply reaffirmed the validity of the earlier production orders"—something the government never asked the district court to do and which the district court did not purport to do—and concluded that the 1979 and 1981 orders were res judicata: to wit, that they were "final, unappealed judgments" sufficient to permit the continuing use and future disclosure of those

materials "regardless of any subsequent change in the law." 889 F.2d at 1468.

REASONS FOR GRANTING THE WRIT

Review on Writ of Certiorari should be granted because the action of the Fifth Circuit in this case violates federal law governing disclosure of grand jury materials that was enunciated by this Court in *Sells Engineering*, and amplified in *United States v. John Doe, Inc. I*, 481 U.S. 102 (1988). Thus, a federal question has been decided by that circuit court in conflict with applicable decisions of this Court. Moreover, granting this writ will permit the Court to resolve a conflict among at least seven circuit courts of appeals concerning the effect of this Court's decision in *Sells Engineering* on Rule 6(e) orders issued prior to the date of that decision.

I. New disclosures of grand jury materials obtained by the IRS pursuant to Rule 6(e) orders entered prior to this Court's decisions in *Baggot* and *Sells Engineering* cannot be permitted without a showing of particularized need.

The 1979 and 1981 Rule 6(e) orders satisfied the standards observed by most federal district courts when they were issued. But those orders would have never been issued had the standards of *Baggot* and *Sells Engineering* been applicable at the time, because there was no hearing and no showing of particularized need. Until late 1989, when the parties received the opinion of the Fifth Circuit Court of Appeals, they approached this controversy as if the standards of *Sells Engineering* for disclosure were pertinent to the proceeding, focusing their

attentions on whether a sufficient showing of particularized need had been made by the government. Indeed, the government's initial moving papers on May 25, 1988, purported to make that showing, and Petitioners' motion to vacate the resulting order challenged the sufficiency of the contents of those moving papers. The evidentiary hearing on September 2, 1988, was conducted to permit the IRS to make a showing of particularized need. The district court did not issue a formal opinion, but concluded in open court that a particularized need had been shown only for the Uni Oil records. Because its order of September 14, 1988, permitted disclosure of virtually all grand jury materials, the appeal of this matter to the Fifth Circuit Court of Appeals was premised upon Petitioners' contention that the *Sells Engineering* standards had not been satisfied for the disclosure of grand jury materials beyond the records of Uni Oil Company[1]

In substance, the Fifth Circuit held that the rule announced in this Court's *Sells Engineering* case applies only to Rule 6(e) orders issued after the *Sells Engineering* decision, rather than to all disclosures which would occur after that decision. Such a holding would have precluded the application of the *Sells Engineering* principles to the case of Sells Engineering, Inc. It is clear from this Court's opinion in *Sells Engineering* that it was intended to apply to all future IRS' uses of grand jury materials for civil

1. In particular, the district court could not have applied the *Sells Engineering* standards properly because the government had failed to make a sufficient showing of possible injustice in another forum, made no effort to balance the need for disclosure of the affected materials against the continuing need for grand jury secrecy, and failed to tailor its order to cover only the materials needed. *See Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 217-224 (1979). The question presented to the Fifth Circuit Court of Appeals was thus a very straightforward one, focused upon those factors.

tax purposes, without regard to whether the Rule 6(e) order was obtained after that decision. This was underlined by the following notation in *Sells Engineering*, 463 U.S. at 422 n.6:

> Each day this order remains effective the veil of secrecy is lifted higher by disclosure to additional personnel and by the continued access of those to whom the materials have already been disclosed. We cannot restore the secrecy that has been lost but we can grant partial relief by preventing further disclosure (cite omitted).

That is precisely the basis on which Petitioners challenged the government's 1987 use of grand jury materials.

Petitioners' interpretation of the *Sells Engineering* standards were confirmed by this Court's subsequent opinion in *United States v. John Doe, Inc. I, supra*, involving the somewhat different question of whether a government attorney involved in a criminal grand jury investigation could continue to use grand jury materials for civil purposes without an order under Rule 6(e). While expressly holding that the attorney did not need to obtain such an order, this Court stressed that utilizing that same material during the civil phases of that dispute, such as disclosing them to others in the course of an actual adversarial proceeding, constituted a circumstance that would require such an order and a showing of particularized need. 481 U.S. at 22.

Petitioners' contention that *Sells Engineering* should be given prospective effect as to post-*Sells Engineering* uses of grand jury materials obtained pursuant to pre-*Sells Engineering* Rule 6(e) orders has been accepted by two Courts of Appeals. *In re Sells*, 719 F.2d 985 (9th Cir.

1983); *United States v. Sutton,* 795 F.2d 1040 (Temp. Emer. Ct. App. 1986). In addition, this interpretation is consistent with the holding of *In re Grand Jury Proceedings (Henry Kluger, Deceased),* 827 F.2d 868, 874 (2d Cir. 1987), which approved a district court's conditioning of new disclosures upon a showing of particularized need. The Fifth Circuit's action in this case is in direct conflict with those decisions.

A fundamental question of the application of this Court's *Baggot* and *Sells Engineering* decisions is at issue in this case. The rule of this Court is clear and should have been applied by the Fifth Circuit Court of Appeals. Failure to resolve this issue will inevitably lead to further failures by district courts and courts of appeals to observe this fundamental rule of federal law.

II. The doctrine of res judicata is not a proper basis for failing to apply the requirements of *Sells Engineering* to preexisting Rule 6(e) orders.

The Fifth Circuit Court's opinion characterized the district court's action as having "reaffirmed the validity of the earlier production orders," and concluded that "(t)he district court did not purport to base its new production order on a standard of 'particularized need,' " as *Sells* requires. 889 F.2d at 1468. To reach this result, the Court of Appeals followed a res judicata approach, which is the approach followed by the Seventh Circuit Court of Appeals in several cases. *See In re Disclosure of Grand Jury Materials (Basic Earth Science Systems, Inc.),* 821 F.2d 1290 (7th Cir. 1987); *In re Grand Jury Proceedings "Operation Gateway," Appeal of James Charles Dugan (Dugan I),* 839 F.2d 390 (7th Cir. 1988);

and *In re Grand Jury Proceedings "Operation Gateway" (Dugan II)*, 877 F.2d 632 (7th Cir. 1989), *cert. denied*, ____U.S.____, 110 S. Ct. 839 (1990). This res judicata approach is inappropriate for two reasons.

Res judicata applies to situations in which the parties have had a full opportunity to be heard on their claims and contentions, regardless of whether a trial has actually taken place. It also contemplates an outcome that is binding in favor of or against all parties to the proceeding in which it has been rendered and their privies. *See Commissioner v. Sunnen*, 333 U.S. 591 (1948); 46 Am. Jur. 2d *Judgments* §§ 457, 477, 478, 518 (1969).

The 1979 and 1981 Rule 6(e) orders were issued *ex parte* without a showing of particularized need. Petitioners were purposefully excluded from those proceedings, and the records were "sealed" in March 1981, similarly without notice to them. Not only were Petitioners denied any opportunity to challenge the disclosures in the first instance, but they belatedly learned about the disclosures long after the Rule 6(e) orders were "final," at a time when no proceeding existed in the issuing court in which the orders could be challenged. When the resulting disclosures first became known, they had no bearing upon the criminal proceedings in which Petitioner Thomas H. Hajecate was involved. The use of the grand jury materials did not become pertinent until the separate civil tax cases ensued, and the publication of the grand jury materials in those proceedings became an issue.

Such *ex parte* orders, entered without notice or hearing, do not support a plea of res judicata. *James v. Beaufort County Board of Education*, 465 F.2d 477 (4th Cir. 1972). Their effect does not extend beyond the court or

the proceeding that produced them. They are not res judicata in a separate civil proceeding and are not comparable to any final judgment produced by an adversary process. *United States v. Wallace & Tiernan Co.*, 336 U.S. 793 (1949). Resolving this controversy on the ground that those Rule 6(e) orders were "final" when the *Sells Engineering* opinion was promulgated will not further the most important policies behind the "finality" doctrine, but at the same time will surely frustrate all of the policies behind this Court's holding on IRS disclosure of grand jury materials expressed in *Sells Engineering*.

Even if an adversarial proceeding had preceded the issuance of the 1979 and 1981 Rule 6(e) orders, the final judgment doctrine is not an absolute or even a reasonable bar to observing an intervening change in the law. In that situation, an appellate court should apply the law that stands on the date of its decision. This Court articulated the proper standard to be used in evaluating the continuing effect of outstanding court orders when the law governing the issuance of such orders has been drastically modified by statute or court decision in *Bradley v. School Board of City of Richmond*, 416 U.S. 696 (1974). The decision in *Bradley* mandates an inquiry as to whether applying the new rule of law would result in "manifest injustice," and the *Bradley* court referred to three considerations in resolving this dilemma: the identity of the parties, the nature of their respective rights, and whether new or unanticipated obligations are imposed on a party without notice and an opportunity to be heard.

Petitioners were not ever a "party" to the 1979 and 1981 Rule 6(e) proceedings. Applying the *Sells Engineering* rule here would not "infringe upon" or "deprive"

the government of any "right" that had matured or become unconditional: Petitioners are not attempting to undo any use or disclosure of the grand jury materials that occurred prior to the *Sells Engineering* decision, and the government is free to make a proper showing of "particularized need" to use the grand jury materials from this point forward. Finally, no new or unanticipated obligations are imposed upon the IRS without notice and an opportunity to be heard.

Under this Court's analysis in *Bradley*, the finality of the orders issued in 1979 and 1981 is irrelevant. A new Rule 6(e) order based upon the *Sells Engineering* standards must be obtained before further IRS' uses occur. The proper rule that the Fifth Circuit Court of Appeals should have applied in this case is the one effective in 1989, as set forth in *Sells Engineering* in 1983. *See Thorpe v. Housing Authority*, 393 U.S. 268, 281-283 (1969); *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801); *State Farm Mutual Automobile Ins. Co. v. Duel*, 324 U.S. 154 (1945), *reh. denied*, 324 U.S. 887 (1945); *Linbach v. Hooven & Allison Co.*, 466 U.S. 353 (1984). Indeed, the strong policy considerations in favor of grand jury secrecy discussed in *Sells Engineering* mandate its prospective application to the issue at hand. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 559 (1984); *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961).

The *Bradley* analysis was adopted by the Ninth Circuit Court of Appeals in *In re Sells, supra*, to reject res judicata and the doctrine of "finality" as a bar to prospective application of the *Sells Engineering* standard. The failure of the Fifth Circuit to consider—or for that matter to apply—this Court's *Bradley* analysis to a situation in-

volving an important, intervening change in federal law offers a secondary but independent justification for granting this Writ of Certiorari.

III. The propriety of prospective disclosures of grand jury materials under pre-*Sells Engineering* Rule 6(e) orders is now the subject of conflicting decisions of seven Courts of Appeals.

Neither the *Sells Engineering* nor *John Doe, Inc. I,* cases addressed the continuing vitality of Rule 6(e) orders entered before those opinions were promulgated. Two Courts of Appeals have applied *Sells Engineering* to deny post-*Sells Engineering* uses of grand jury materials without a new Rule 6(e) order premised upon a requisite showing of particularized need: the Ninth Circuit in *In re Sells, supra,* and the Temporary Emergency Court of Appeals in *United States v. Sutton, supra.* The Second Circuit Court of Appeals approved this approach in *In re Grand Jury Proceedings (Henry Kluger, Deceased), supra.*

The contrary rule exists in the Fifth and Seventh Circuits. The Fourth Circuit Court of Appeals reached a similar result in *United States v. (Under Seal),* 783 F.2d 450 (4th Cir. 1986), *cert. denied sub nom., Ravens Hollow Ltd. v. United States,* 481 U.S. 1032 (1987), but its holding can be distinguished on the ground that the dispute followed a full criminal trial at which all the grand jury materials were publicly disclosed. Moreover, in a dissent filed in that case, Judge Buzner noted that the government's continued use of grand jury materials constituted a new disclosure that should be held to the standards of "particularized need" reflected in the change in applicable law. 783 F.2d at 453-454. Finally, the Third Circuit Court of Appeals has applied a different standard

that focuses upon whether the IRS agents acted in good faith reliance upon facially valid Rule 6(e) orders. If they did, it held that the grand jury evidence would not be suppressed in subsequent civil proceedings. *Graham v. Commissioner,* 770 F.2d 381 (3d Cir. 1985).

Because of this conflict in the Circuit Courts on this important issue of federal law, Petitioners' application for a Writ of Certiorari should be granted.

CONCLUSION

Petitioners request the Supreme Court to issue a Writ of Certiorari to the Court of Appeals for the Fifth Circuit to review the issues presented in this case.

Respectfully submitted,

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APPENDIX

APPENDIX A

In the Matter of the DECEMBER 3, 1979
HOUSTON DIVISION FEDERAL GRAND JURY,
Appellants.

No. 89-2195.

United States Court of Appeals,
Fifth Circuit.

Dec. 14, 1989.

Rehearing Denied Jan. 11, 1990.

Following ruling by Tax Court in civil tax litigation, which prevented government from further disclosure or use of grand jury materials to which it had originally been given access in earlier orders, government brought new motion for disclosure of materials in same court that had issued prior orders. The United States District Court for the Southern District of Texas, Norman W. Black, J., granted production, and taxpayers appealed. The Court of Appeals, Edith H. Jones, Circuit Judge, held that final, unappealed district court orders for production of grand jury documents for use in civil tax proceedings against taxpayers remained binding, regardless of subsequent United States Supreme Court case law narrowing disclosure by requiring government to show particularized need to obtain grand jury materials for use in litigation, and thus subsequent district court order requiring production of those materials simply reaffirmed validity of earlier production orders and subsequent case law could

not be deemed to have "prospective" effect in tax litigation.

Affirmed.

George W. Connelly, Jr., Shelley Cashion and Ruth E. Salek, Chamberlain, Hrdlicka, White, Johnson & Williams, Houston, Tex., for appellant.

William A. Whitledge, Gary R. Allen, Charles E. Brookhart, Dept. of Justice, Washington, D.C., and Henry K. Oncken, U.S. Atty., Houston, Tex., for appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before GEE, JONES and SMITH, Circuit Judges.

EDITH H. JONES, Circuit Judge:

By this appeal, taxpayers Mr. and Mrs. Hajecate, whose business dealings were the subject of investigation by three grand jury panels between 1978 and 1979, seek to prevent the government from using their individual and corporate business records, which were produced by subpoena to the grand jury, in a case now pending before the Tax Court. The district court, in orders entered in 1979, 1981 and 1988, approved the disclosure. We affirm.

This case appears before us only because a 1988 ruling by the Tax Court prevented the government from further disclosure or use of the materials to which it was originally given access in 1979 and 1981. Grand juries had been investigating two Hajecates, father and son, and others with regard to possible tax evasion, RICO and price fixing. The district court ordered disclosure of the grand

jury materials to the IRS for use in its investigation of the Hajecates and related entities for civil tax liability. Based upon its examination of these materials, the IRS asserted civil tax deficiencies against the taxpayers for the years 1976 through 1978.

Before the taxpayers' Tax Court case came to trial, but after the orders producing the grand jury documents to the IRS became final, the Supreme Court narrowed the standards for Fed. R. Crim. P. 6(e) motions granting disclosure of grand jury materials. *United States v. Baggot,* 463 U.S. 476, 103 S. Ct. 3164, 77 L.Ed.2d 785 (1983); *United States v. Sells Engineering, Inc.,* 463 U.S. 418, 103 S. Ct. 3133, 77 L.Ed.2d 743 (1983). Henceforth, the government, like private litigants, would have to demonstrate "particularized need" to obtain such materials for use in civil tax actions.

In February, 1988, the Tax Court held that *Baggot* and *Sells* should have "prospective" effect in the Hajecates' case. Thus, while the Tax Court could not undo disclosures previously made to the government under Rule 6(e), further disclosure or use of the materials garnered by the 1979 and 1981 district court orders would not be permitted except upon a showing of "particularized need" by the government. The government was prevented from using in the trial proceedings the grand jury materials upon which it had based its deficiency claims. Moreover, according to the government, most of these documents were original personal and business records that could not be obtained from the taxpayers or elsewhere.

Relying upon the 1979 and 1981 disclosure orders, the government filed a new Rule 6(e) motion covering the

documents in the district court which had issued the prior orders.[1] The government also contended that it had demonstrated a "particularized need" for the production of those documents in order to continue its tax case against the Hajecates. The court immediately granted production. Upon receiving a motion for reconsideration by the taxpayers, further briefing and a hearing were held. The district court then issued the production order which is the subject of this appeal, and which authorizes production of all of the grand jury materials except transcripts of testimony by witnesses before the grand jury.

This is not the first time that the Tax Court has decided not to permit the government to use grand jury records that it obtained pursuant to pre-*Baggot* and *Sells* orders. In *In re Grand Jury Proceedings "Operation Gateway" (Dugan II)*, 877 F.2d 632 (7th Cir. 1989), a virtually identical procedural path was trod by the government to the Seventh Circuit. There, the taxpayer had already received a Seventh Circuit determination that *Sells* did not apply to the future use of materials obtained before *Sells*. *In re Grand Jury Proceedings "Operation Gateway", Appeal of James Charles Dugan (Dugan I)*, 839 F.2d 390 (7th Cir. 1988), *citing In re Disclosure of Grand Jury Material, (Basic Earth Science Systems, Inc.)*, 821 F.2d 1290 (7th Cir. 1987). Undaunted, the taxpayer sought and obtained a contrary ruling from the Tax Court, which issued an order forbidding the government to use documents it obtained from the grand jury in 1981, i.e. pre-*Sells*, without a showing of particularized need. Rather

1. In the trial court, the government also contended that the business records of the Hajecates and related entities are not grand jury materials, as described in Fed. R. Crim. P. 6(e). The district court did not rule on that question, and it is neither briefed nor argued in this Court.

than appeal the Tax Court's decision directly, the government, as it did here, asked the district court for a new Rule 6(e) order covering the documents previously produced. When the taxpayer appealed the new production order, the Seventh Circuit interpreted the district court's opinion as a clarification of its 1981 turnover order and so enforced it.

Apart from the fact that the Tax Court's order that led to the *Dugan II* decision was square in the teeth of a prior Seventh Circuit opinion allowing disclosure in the same taxpayer's case, we see no significant difference between that case and the one before us. The 1979 and 1981 orders were, regarding the Hajecates' and related entities' records, final, unappealed judgments of the district court. As such, they remained binding "regardless of any subsequent change in the law." *In re Disclosure of Grand Jury Material (Basic Earth Science Systems, Inc.)*, 821 F.2d at 1293. By its 1988 order, the district court simply re-affirmed the validity of the earlier production orders. Perhaps it could have modified or vacated those orders to take into account the new rules announced in *Sells* and *Baggot*, but it did not do so.[2] *See also Dugan I*, 839 F.2d 390 (7th Cir. 1988); *In Re Grand Jury Proceedings (Estate of Kluger)*, 827 F.2d 868, 873 (2d Cir. 1987). The district court did not purport to base its new production order on a standard of "particularized need," as *Sells* requires. We must infer that it elected to rest on the earlier production orders rather than to vacate or modify those judgments in light of *Sells*.

---

2. The district court's 1988 disclosure order does narrow the scope of production to the extent that it did not include transcripts of grand jury testimony. The district court did not base this change on the requirements of *Baggot* or *Sells*.

Because it is our practice to follow the decisions of other circuits unless we strongly disagree with them, and because we strongly agree with the resolution of this tangled procedural skein in *Dugan II*, we conclude that the 1988 order for the production of grand jury documents must be AFFIRMED.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-2195

IN THE MATTER OF THE DECEMBER 3, 1979
HOUSTON DIVISION FEDERAL GRAND JURY,
Appellants.

Appeal from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING

(January 11, 1990)

Before GEE, JONES and SMITH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ EDITH H. JONES 1/8/90
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NO. H-81-36

IN THE MATTER OF THE DECEMBER 3, 1979
HOUSTON DIVISION FEDERAL GRAND JURY

(Filed May 25, 1988)

ORDER

Upon consideration of the *ex parte* motion under Rule 6(e) of the Federal Rules of Criminal Procedure by the United States Attorney for the Southern District of Texas:

It is ORDERED and DECREED, pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, that agents of the Internal Revenue Service, counsel for the Internal Revenue Service, and all necessary support staff of the Internal Revenue Service and its counsel be granted access to transcripts of testimony taken and subpoenaed books and records, or copies thereof, brought before the successive grand juries empaneled in the Houston Division of the Southern District of Texas on April 17, 1978, April 30, 1979, and December 3, 1979, which were investigating possible violations of 10 Code of Federal Regulations, §§ 212.31, 210.62(c); Title 18 United States Code, §§ 371, 2, 1341, 1343, 1001, 1962(c) and 1962(d); Title 26, United States Code, §§ 7206(1) and 7201; and Title 31, United States Code, §§ 1058, 1059, 1101, and 1121, in order to determine or redetermine by any means,

including, but not necessarily limited to, any proceeding in the United States Tax Court, whether there is any civil tax liability due from Thomas H. Hajecate, Dorothy A. Hajecate, Thomas M. Hajecate, Kitten I. Hajecate, Linda L. Burch and Texas Independent Oil Co.

It is further ORDERED and DECREED, pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, that the agents of the Internal Revenue Service, the counsel for the Internal Revenue Service, and all the necessary support staff of the Internal Revenue Service and its counsel, as are hereby granted access to the documents described above, may examine, inspect, read, copy, and in all manners use the books, records, information and materials brought before or created in the proceedings of any of the grand juries that investigated potential criminal violations of certain laws of the United States allegedly committed by petitioners in the Tax Court proceedings identified by Tax Court Docket Nos. 498-81, 499-81, 500-81, 1250-82, 1251-82, 792-83, 793-83, 794-83, 795-83, and 6809-83.

DONE at Houston, Texas, this 25th day of May, 1988.

/s/ NORMAN BLACK
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

H 81-36

IN THE MATTER OF DECEMBER 3, 1979
HOUSTON DIVISION FEDERAL GRAND JURY

HOUSTON, TEXAS
SEPTEMBER 2, 1988

HEARING

Before the Honorable Norman W. Black

APPEARANCES:

For the United States:

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Ms. Nancy Pecht
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For Thomas H. Hajecate
Dorothy A. Hajecate
Thomas M. Hajecate:

George W. Connelly, Jr.
CHAMBERLAIN, HRDLICKA, WHITE,
JOHNSON & WILLIAMS
1400 Citicorp Center
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Houston, Texas 77002

and:

Thano Dameris

Joyce K. Schaefer
Official Court Reporter

[By Ms. Urban, for the United States]

> * * * Specifically to reply to another point brought up by counsel, we don't deny that the government—the government doesn't deny that we want to use those records. Those are the original records of Uni Oil. Those are the original records, ledgers, correspondence, everything. * * *

THE COURT: Do you have any interest in the Grand Jury transcripts?

MS. URBAN: Not that I know of. No.

THE COURT: Well, I think you've shown a particularized need for the company's records.

MS. URBAN: That is what I am interested in.

THE COURT: That is all you've been asking for.

MS. URBAN: Correct.

THE COURT: All right. Do we need to modify the Order to make it clear?

MS. URBAN: That can certainly be accomplished, Your Honor.

THE COURT: All right.

* * * * *

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NO. H-81-36

IN THE MATTER OF THE DECEMBER 3, 1979
HOUSTON DIVISION FEDERAL GRAND JURY

(Filed September 14, 1988)

ORDER

Upon consideration of the *ex parte* motion under Rule 6(e) of the Federal Rules of Criminal Procedure by the United States Attorney for the Southern District of Texas:

It is ORDERED and DECREED, pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, that agents of the Internal Revenue Service, counsel for the Internal Revenue Service, and all necessary support staff of the Internal Revenue Service and its counsel be granted access to subpoenaed books and records, or copies thereof, brought before the successive grand juries empaneled in the Houston Division of the Southern District of Texas on April 17, 1978, April 30, 1979, and December 3, 1979, which were investigating possible violations of 10 Code of Federal Regulations, §§ 371, 2, 1341, 1343, 1001, 1962(c) and 1962(d); Title 26, United States Code, §§ 7206(a) and 7201; and Title 31, United States Code, §§ 1058, 1059, 1101, and 1121, in order to determine or redetermine by any means, including but not necessarily limited to, and proceeding in the United States

Tax Court, whether there is any civil tax liability due from Thomas H. Hajecate, Dorothy A. Hajecate, Thomas M. Hajecate, Kitten I. Hajecate, Linda L. Burch and Texas Independent Oil Co.

It is further ORDERED and DECREED, pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, that the agents of the Internal Revenue Service, the Counsel for the Internal Revenue Service, and all the necessary support staff of the Internal Revenue Service and its counsel, as are hereby granted access to the documents described above, may examine, inspect, read, copy, and in all manners use the books, records, information and materials brought before the proceedings of any of the grand juries that investigated potential criminal violations of certain laws of the United States allegedly committed by petitioners in the Tax Court proceedings identified by Tax Court Docket Nos. 498-81, 499-81, 500-81, 1250-82, 1251-82, 792-83, 793-83, 794-83, 795-83, and 6809-83.

DONE at Houston, Texas, this 14th day of September, 1988.

/s/ NORMAN BLACK
United States District Judge

Supreme Court, U.S.
FILED
JUN 11 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1570 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1989

THOMAS H. HAJECATE AND DOROTHY A. HAJECATE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

SHIRLEY D. PETERSON
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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether this Court's decisions in *United States* v. *Baggot*, 463 U.S. 476 (1983), and *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983), should be applied to prohibit the use of grand jury materials authorized by the district court's 1979 and 1981 orders and previously disclosed to the IRS pursuant to those orders.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Chicot County Drainage District v. *Baxter State Bank*, 308 U.S. 371 (1940)	5, 8
Disclosure of Grand Jury Material (Basic Earth Science Systems, Inc.), In re, 821 F.2d 1290 (7th Cir. 1987)	3, 6, 8
Dugan v. *United States*, 110 S. Ct. 839 (1990)	4
Gluck v. *United States*, 771 F.2d 750 (3d Cir. 1985)	6
Graham v. *Commissioner*, 770 F.2d 381 (3d Cir. 1985)	8
Grand Jury Investigation (Sells), In re, 719 F.2d 985 (9th Cir. 1983)	7
Grand Jury Proceedings (Henry Kluger, Deceased) In re, 827 F.2d 868 (2d Cir. 1987)	8
Grand Jury Proceedings "Operation Gateway" In re, 877 F.2d 632 (7th Cir. 1989), cert. denied *sub nom. Dugan* v. *United States*, 110 S. Ct. 839 (1990)	3, 6
Hajecate v. *Commissioner*, 90 T.C. 280 (1988)	2, 3
Raven's Hollow, Ltd. v. *United States*, 481 U.S. 1032 (1987)	4
System Federation No. 91 v. *Wright*, 364 U.S. 642 (1961)	5, 6, 7
Thorpe v. *Housing Authority*, 393 U.S. 268 (1969)	7
United States v. *Baggot*, 463 U.S. 476 (1983)	2, 4

Cases – Continued: Page

United States v. *Leon*, 468 U.S. 897 (1984) 6
United States v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983) 2, 4, 6
United States v. *Sutton*, 795 F.2d 1040 (Temp. Emer. Ct. App. 1986), cert. denied, 479 U.S. 1030 (1987) 8-9
United States v. *Swift & Co.*, 286 U.S. 106 (1932) 5
United States v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801) 7-8
United States v. *(Under Seal)*, 783 F.2d 450 (4th Cir. 1986), cert. denied, 481 U.S. 1032 (1987) 6

Statute and rule:

18 U.S.C. 1001 2
Fed. R. Crim. P. 6(e) 2, 3, 4, 5, 6, 7, 8, 9

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1570

THOMAS H. HAJECATE AND DOROTHY A. HAJECATE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 889 F.2d 1466. The order of the district court (Pet. App. 12a-13a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 14, 1989. A petition for rehearing was denied on January 8, 1990 (Pet. App. 7a). The petition for a writ of certiorari was filed on April 5, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a series of federal grand jury investigations in 1978 and 1979 into petroleum pricing practices, peti-

tioner Thomas Hajecate was indicted on various violations of federal law, including price fixing, tax evasion, and RICO violations. He subsequently pleaded guilty to a superseding information charging him with violating 18 U.S.C. 1001. Petitioner Thomas Hajecate's counsel in the criminal case was given unlimited access to the grand jury materials (see Sept. 2, 1988 Tr. (Pt. 2), at 8). Pet. App. 2a-3a; Pet. 4.

In 1979, and again in 1981, the United States District Court for the Southern District of Texas, pursuant to *ex parte* government motions, entered orders under Fed. R. Crim. P. 6(e) authorizing disclosure of matters occurring before those grand juries to the Internal Revenue Service for use in determining petitioners' correct tax liability for the years 1976 through 1978. The documents disclosed to the IRS under the terms of those orders formed the basis of statutory notices of deficiency in income tax for 1976-1978 that were issued to petitioners by the IRS in October 1980, 1981, and 1982. Petitioners timely filed petitions with the Tax Court to challenge those deficiencies. See Pet. App. 3a; *Hajecate* v. *Commissioner*, 90 T.C. 280, 283-284 (1988).

2. On June 30, 1983, while the petitions were pending in the Tax Court, this Court held that the provisions of Rule 6(e) require the government to make a showing of particularized need in order to obtain disclosure of matters occurring before a grand jury (*United States* v. *Sells Engineering, Inc.*, 463 U.S. 418) and do not otherwise allow disclosure of matters occurring before a grand jury for use in an investigation to determine civil tax liability (*United States* v. *Baggot*, 463 U.S. 476). Subsequently, petitioner filed a motion in the Tax Court to determine the IRS's right to use the grand jury material, arguing that *Baggot* and *Sells* should be given retroactive application to invalidate the Rule 6(e) order under which the IRS had obtained the grand jury materials. See Pet. 5; *Hajecate* v. *Commissioner*, 90 T.C. at 281-282.

The Tax Court granted petitioners' motion in part. *Hajecate* v. *Commissioner*, *supra*. The Tax Court held that *Baggot* and *Sells* should be given "prospective" effect to preclude the government from further using the materials obtained under the original disclosure orders until the government obtained a new Rule 6(e) order from the district court by satisfying the standard of "particularized need" required by *Sells* (90 T.C. at 292; see Pet. App. 3a). Accordingly, the Tax Court entered an order that prevented the government from further disclosure or use of the material to which it was originally given access under the terms of the 1979 and 1981 Rule 6(e) orders, and upon which it had based its deficiency claims (Pet. App. 3a).

3. Relying on the prior Rule 6(e) orders, the government thereafter made a new *ex parte* application to the United States District Court for the Southern District of Texas seeking access to the same materials obtained under the prior orders. The government also contended that it had a "particularized need" for the documents in order to continue its case against petitioners in the Tax Court. See Pet. App. 3a-4a. The district court entered an order authorizing production and the continued use of the grand jury materials in the Tax Court proceedings (except for transcripts of testimony by witnesses), and the district court subsequently denied petitioner's motion to vacate that order (Pet. App. 8a-9a, 12a-13a; see also *id.* at 4a).

4. The court of appeals affirmed the district court's order (Pet. App. 1a-6a). Expressly agreeing with the Seventh Circuit's decisions in *In re Grand Jury Proceedings "Operation Gateway" (Dugan II)*, 877 F.2d 632 (1989), cert. denied *sub nom. Dugan* v. *United States*, 110 S. Ct. 839 (1990), and *In re Disclosure of Grand Jury Material (Basic Earth Science Systems, Inc.)*, 821 F.2d 1290 (1987), the court of appeals held that the 1979 and 1981 Rule 6(e) orders were final judgments of the district court that remained binding

unless modified, regardless of the change in the law occasioned by *Baggot* and *Sells*. Pet. App. 5a-6a. The court of appeals therefore concluded that there was no basis for reversal even though the district court had not based its new order on satisfaction of a standard of particularized need. Rather, the court observed that the district court had chosen not to modify or vacate the orders in light of *Sells*, but had "simply re-affirmed the validity of the earlier production orders"; the court of appeals explained that this was permissible because the prior orders were "final, unappealed judgments of the district court" that "remained binding 'regardless of any change in the law.' " *Id.* at 5a.

ARGUMENT

Petitioner contends that this Court should grant certiorari to consider the effect of its decisions in *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983), and *United States* v. *Baggot*, 463 U.S. 476 (1983), on outstanding Rule 6(e) orders issued before the date of those decisions. This issue plainly does not warrant review by this Court. There is no conflict in the circuits on this question, and the court of appeals correctly rejected petitioners' contention. Moreover, the significance of the issue presented by petitioners is continually diminishing with the passage of time because it applies only to Rule 6(e) orders entered before June 30, 1983. This Court has already declined to consider this issue on two occasions, including in the case heavily relied upon by the court below (see *Dugan* v. *United States*, 110 S. Ct. 839 (1990); *Raven's Hollow, Ltd.* v. *United States*, 481 U.S. 1032 (1987)), and there is no more reason to grant certiorari here.

1. There is no merit to petitioners' contention that *Baggot* and *Sells* should be applied to prevent the use after June 30, 1983, of grand jury materials obtained under pre-existing Rule 6(e) orders. *Baggot* and *Sells* announced standards

that a court must follow in authorizing, in the first instance, disclosure of grand jury materials under Rule 6(e); those cases did not purport to prohibit future use of grand jury materials obtained under the authority of Rule 6(e) orders that had previously been entered under a lesser standard or to invalidate all such outstanding orders. It is well established that a final order in a civil case cannot be retrospectively challenged on the basis of a subsequent decision. *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371 (1940).[1] There is similarly no reason to vacate a Rule 6(e) order that was properly issued under then-prevailing standards and subsequently relied on in determining the tax deficiencies under dispute in the Tax Court proceeding when there has been no showing (and none was made here) that a failure to vacate the order would be inequitable. See, *e.g.*, *System Federation No. 91* v. *Wright*, 364 U.S. 642, 647 (1961); *United States* v. *Swift & Co.*, 286 U.S. 106, 119 (1932).[2] Accordingly, petitioners' conten-

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[1] Contrary to petitioners' contention (Pet. 12-15), the fact that the original Rule 6(e) orders were issued in an *ex parte* proceeding does not mean that they were not "final" before *Sells* and *Baggot* were decided. The courts below recognized (see Pet. App. 5a) that those orders authorized the use of the grand jury materials in the Tax Court proceeding involved here. Thus, unless there is some reason for modifying or vacating those orders, they continue to permit the authorized uses. As discussed *infra*, and as the courts below held (*ibid.*), the decision in *Sells* did not require that existing orders be modified or vacated.

[2] *Wright* makes clear that valid court orders need not be vacated or modified to account for a change in the law that would have precluded their issuance as an original matter. The Court stated in *Wright* that "[a] balance must be struck between the policies of *res judicata* and the right of the court to apply modified measures to changed circumstances" (364 U.S. at 647-648) and that because there is "such a balance of imponderables there must be wide discretion in the District Court" (*id.* at 648). Modification is required only "when a change in law or facts has made inequitable what was once equitable"

tion has consistently been rejected by the courts of appeals. See *Dugan II*, *supra*; *In re Basic Earth Science Systems, Inc.*, *supra*; *United States* v. *(Under Seal)*, 783 F.2d 450 (4th Cir. 1986), cert. denied, 481 U.S. 1032 (1987); *Gluck* v. *United States*, 771 F.2d 750 (3d Cir. 1985) (grand jury materials obtained under a facially valid pre-*Baggot* and *Sells* Rule 6(e) order are not suppressible even under the assumption that *Baggot* and *Sells* should be applied retroactively).

Vacating the Rule 6(e) orders entered in this case would not vindicate the public policies underlying *Baggot* and *Sells* and is not necessary to eliminate any actual unfairness to petitioners. The materials in question were disclosed to the IRS pursuant to a disclosure order that petitioners concede was valid when entered. There is thus no suggestion of improper government conduct that needs to be remedied. See *Gluck* v. *United States*, 771 F.2d at 757-758 (upholding IRS summons issued in good-faith reliance on a pre-*Baggot* Rule 6(e) disclosure order); cf. *United States* v. *Leon*, 468 U.S. 897 (1984). To the contrary, the effect of vacating the order here would be further to delay and complicate tax proceedings prepared in good faith and commenced more than eight years ago. Moreover, prohibiting the future use of materials disclosed under pre-1983 Rule 6(e) orders is obviously not necessary to protect the public policies underlying the decision in *Sells* – enhancing the willingness of grand jury witnesses to come forward and testify fully and candidly, and preventing the improper use of the grand jury for civil discovery purposes. See *Sells*, 463 U.S. at 432-433. Those interests are safeguarded by applying the standards adopted in *Baggot* and *Sells* to future disclosure applications.

(*id.* at 652). Petitioners do not explain why it would be inequitable to allow the IRS to continue to use the grand jury materials in accordance with the original Rule 6(e) orders; to the contrary, it would be inequitable to prohibit such use.

On the other hand, petitioners' proposed application of *Baggot* and *Sells* could significantly prejudice the government's opportunity to complete the ongoing civil and administrative proceedings. The government reasonably relied on these materials in preparing for and developing those proceedings. Vacating the Rule 6(e) order would, at a minimum, force the government to engage in the burdensome process of attempting to reacquire these materials through civil discovery or under the IRS's subpoena power. At worst, the government could be denied the opportunity to obtain these materials at all, either because they are no longer available (see Pet. App. 3a) or on the ground that the IRS's efforts to reacquire these materials are "tainted" by the knowledge it obtained from its current use of them. Petitioners have offered no reason why they should be allowed to obtain an inequitable litigating advantage in that fashion—to the detriment of a just resolution of the merits of the tax controversy. In sum, in these circumstances it would be a decision to revoke the pre-1983 Rule 6(e) orders, not the continued effectiveness of those orders, that would serve as "an instrument of wrong" (*System Federation No. 91* v. *Wright*, 364 U.S. at 647).

2. Contrary to petitioners' contention (Pet. 16-17), the decision below does not conflict with any decision of another court of appeals. *In re Grand Jury Investigations (Sells)*, 719 F.2d 985 (9th Cir. 1983), in contrast to this case, involved a direct appeal from a Rule 6(e) order entered before *Baggot* was decided. Following the rule that an appellate court should apply existing law (see, *e.g.*, *Thorpe* v. *Housing Authority*, 393 U.S. 268, 281-283 (1969)), the court of appeals held that the Rule 6(e) order must be reversed on the authority of *Baggot*. But the Ninth Circuit's decision in *Sells*, like this Court's decisions in *Thorpe* and *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110

(1801), has no bearing on petitioners' contentions here. When a case is pending on direct review at the time the controlling law changes, *Schooner Peggy* holds that the appellate court ordinarily applies the law as it exists, *i.e.*, in light of the recent change. That principle, however, does not apply to orders that have already become final, and thus are before the court only by virtue of an attempt to modify or vacate such orders because of the change in the law. See *Chicot County Drainage District* v. *Baxter State Bank*, *supra*; *In re Basic Earth Science Systems, Inc.*, 821 F.2d at 1293.

Similarly, there is no conflict between the decision below and the Second Circuit's decision in *In re Grand Jury Proceedings (Henry Kluger, Deceased)*, 827 F.2d 868 (2d Cir. 1987). In *Kluger*, the district court had modified a pre-*Baggot* Rule 6(e) order to condition further disclosures on a showing of particularized need. The court of appeals emphasized that this modification was an exercise of the district court's discretion and therefore the scope of appellate review was "narrow" (827 F.2d at 874). The court of appeals upheld the modification, explaining that it was "unable to conclude that" the district judge had "transgressed the limits of his discretion" (*ibid.*). Clearly, that decision does not stand for the proposition that every pre-1983 Rule 6(e) order must be vacated unless the government makes a showing of particularized need. Accordingly, it does not conflict with the decision below, which did not deny that the district court could have determined to modify the orders in light of *Baggot* and *Sells*.[3]

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[3] In *Graham* v. *Commissioner*, 770 F.2d 381 (1985), the Third Circuit held that even retroactive application of *Baggot* and *Sells* would not provide grounds for the Tax Court to suppress grand jury materials obtained by the IRS prior to 1983 in good faith reliance on a Rule 6(e) order. *United States* v. *Sutton*, 795 F.2d 1040 (Temp. Emer. Ct.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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App. 1986), cert. denied, 479 U.S. 1030 (1987), did not involve the "particularized need" standard at all, but rather the question whether certain materials were protected by Rule 6(e). The court of appeals did not vacate the district court's order; it upheld the district court's determination that certain material was protected by Rule 6(e), noting that the ruling was based on existing law. See 795 F.2d at 1051.

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